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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JASPER STEVENS et al.,	
Plaintiffs and Appellants,	E068333
v.	(Super.Ct.No. MCC1600867)
WESTERN PROGRESSIVE, LLC,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed.

Jasper Stevens, in pro. per., for Plaintiff and Appellant.

Brenda Louise Murray Stevens, in pro. per., for Plaintiff and Appellant.

Bryan Cave Leighton Paisner, Aileen M. Hunter, Stacey L. Herter, and Kristin S. Webb for Defendant and Respondent.

In this foreclosure action, plaintiffs and appellants Jasper Stevens and Brenda Louise Murray Stevens (the Stevenses) appeal from an order sustaining defendant and respondent Western Progressive, LLC's demurrer without leave to amend. We affirm.

I. FACTS

In 2006, the Stevenses executed a deed of trust securing a note on residential property located in Temecula (the Property). At some point, they went into default. Western Progressive, LLC (Western Progressive), who was substituted in as trustee in 2014, recorded a Notice of Default against the Property in 2014 and a Notice of Trustee's Sale in 2015.

Western Progressive was not the only creditor seeking to recover against the Property. Harveston Community Association (the HOA),[1] either directly or through its trustee, recorded a Notice of Delinquent Assessment against the Property in 2014, a Notice of Default in 2015, and a Notice of Trustee's Sale in January 2016.

In February 2016, the trustee under the HOA's lien sold the Property to the HOA. The Deed Upon Trustee's Sale was recorded in June 2016. In August 2016, Western Progressive recorded another Notice of Trustee's Sale against the Property.[2]

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[1] Western Progressive characterizes Harveston Community Association as a homeowners association. This is corroborated to some degree by the 2015 "Notice of Default and Election to Sell Under Homeowners Association Lien" Harveston Community Association recorded against the Property. The HOA is not a party to this action.

[2] Neither Western Progressive nor the Stevenses contend that the sale of the Property to the HOA was void or voidable. (Although the complaint alleges that some "Trustee's Deed Upon Sale" is invalid, it is not clear whether this refers to the deed

The Stevenses then initiated this lawsuit in September 2016 against Western Progressive and Ocwen Loan Servicing, LLC (Ocwen), the alleged beneficiary under the note. Although the complaint listed over a dozen causes of action, only three were against Western Progressive: the second cause of action for violations of the federal Fair Debt Collection Practices Act (or FDCPA, 15 U.S.C. § 1692 et seq.), the third cause of action for violations of the federal Real Estate Settlement Procedures Act (or RESPA, 12 U.S.C. § 2601 et seq.), and the fourth cause of action, denominated in the complaint at "Set Aside and Vacate Trustee's Sale [¶] Cancellation of Deed of Trust [¶] California Civil Code § 3412."

Western Progressive and Ocwen demurred, arguing that the complaint does not state facts sufficient to constitute a cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e). The trial court agreed. Although the trial court sustained the demurrer as to certain causes of action with leave to amend, it sustained those pertaining to Western Progressive without leave to amend and dismissed Western Progressive with prejudice.

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granting title to the HOA, as no deed was included as an exhibit to the complaint and no other details about the deed are alleged. In any event, no cause of action is alleged against the HOA.) Also, it is not clear from the record whether Western Progressive has conducted a trustee's sale pursuant to either of its recorded notices.

II. DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.)

"On demurrer, pleadings are read liberally and allegations contained therein are assumed to be true." (*Shields v. County of San Diego* (1984) 155 Cal.App.3d 103, 113.) This assumption, however, "does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken." (*Vance v. Villa Park Mobilehome Estates* (1995) 36 Cal.App.4th 698, 709.)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment."'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) "This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend." (*Id.* at p. 971.)

B. *The FDCPA Cause of Action*

The FDCPA "prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices." (*Heintz v.*

Jenkins (1995) 514 U.S. 291, 292.) The term "debt collector" is defined generally as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed . . . ." (15 U.S.C. § 1692a(6).)

Here, Western Progressive recorded a Notice of Default and two Notices of Trustee's Sale. Such actions are consistent with and limited to nonjudicial foreclosure proceedings and, without more, do not make one a "debt collector" under the FDCPA's general definition. (*Obduskey v. McCarthy & Holthus LLP* (Mar. 20, 2019, No. 17-1307) __ U.S. __ [2019 U.S. LEXIS 2090, *5, *6, 139 S.Ct. 1029, 1033, 203 L.Ed.2d 390, 394] [one whose business is limited to nonjudicial foreclosure proceedings not a "debt collector" under 15 U.S.C. § 1692a(6)].) Although the Stevenses allege that Western Progressive also "misrepresented the facts" so that it and Ocwen could "steal" the Property, such an allegation is insufficient to turn Western Progressive into one whose "principal" business is debt collection or who "regularly" collects debts under 15 U.S.C. section 1692a(6).

The FDCPA also includes a definition of the term "debt collector" that applies in only limited circumstances. Specifically for purposes of 15 U.S.C. section 1692f(6), the term "also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." (15 U.S.C. § 1692a(6).) Section 1692f(6) prohibits a debt collector from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if — [¶] (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

[¶] (B) there is no present intention to take possession of the property; or [¶] (C) the property is exempt by law from such dispossession or disablement." (U.S.C. § 1692f(6).) The section "protect[s] a consumer against the abusive practices of a security enforcer who does not fit the broader definition of a debt collector." (*Vien-Phuong Thi Ho v. Recontrust Co., NA* (9th Cir. 2017) 858 F.3d 568, 573.)

Western Progressive provides no reason why it, a foreclosing trustee, does not fall under this narrower definition of "debt collector." Its argument that foreclosing on a property is not protected by the FDCPA is correct under the general definition (as discussed above) but not under 15 U.S.C. section 1692f(6). Simply put, "[s]ection 1692f(6) regulates nonjudicial foreclosure activity." (*Dowers v. Nationstar Mortg., LLC* (9th Cir. 2017) 852 F.3d 964, 971.)

Nevertheless, we are not convinced that the Stevenses have a reasonable possibility of stating a cause of action under 15 U.S.C. section 1692f(6) because the Stevenses no longer owned the Property by the time Western Progressive recorded a second Notice of Trustee's Sale in August 2016.[3] Recording a Notice of Trustee's Sale does not "threaten[]" the Stevenses under these circumstances, and of course Western

[3] Any FDCPA cause of action would be time-barred to the extent it is based on the Notice of Default Western Progressive recorded in 2014 and first Notice of Trustee's Sale it recorded in July 2015, as the cause of action must be brought "within one year from the date on which the violation occurs." (15 U.S.C. § 1692k(d).) The complaint was filed in September 2016.

Progressive cannot take from the Stevenses something that they no longer own.[4] Even if we were to assume that the Stevenses still owned the Property (because the HOA wrongfully foreclosed on the Property, for example), the complaint alleges no facts suggesting that Western Progressive may have violated section 1692f(6). Thus, even though Western Progressive may be a "debt collector" for purposes of section 1692f(6), the Stevenses fail to allege that it has engaged in any prohibited conduct.

C. *The RESPA Cause of Action*

"Enacted in 1974, RESPA regulates the market for real estate 'settlement services,' a term defined by statute to include 'any service provided in connection with a real estate settlement'" such as title searches, loan origination, and real estate or broker services. (*Freeman v. Quicken Loans, Inc.* (2012) 566 U.S. 624, 626-627, citing 12 U.S.C. § 2602(3).) Among other things, RESPA prohibits any person from accepting any "fee, kickback, or thing of value pursuant to any agreement" that real estate settlement services will be referred to any person. (12 U.S.C. § 2607, subd. (a).) Actions by individuals alleging violations of this no-kickback rule must be brought "within . . . 1 year . . . from the date of the occurrence of the violation . . . ." (12 U.S.C. § 2614.) Actions alleging other violations of RESPA must be brought "within 3 years . . . from the date of the occurrence of the violation . . . ." (12 U.S.C. § 2614.)

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[4] While the August 2016 Notice of Trustee's Sale might falsely identify the Stevenses as the owners or constitute harassing behavior (or both), Western Progressive would have to fall under the general definition of "debt collector" in order for the FDCPA's prohibition on false representations or harassing conduct to reach it. (15 U.S.C. §§ 1692d-1692e.) As discussed above, it does not.

Here, although the complaint indicates that the RESPA cause of action is alleged against Western Progressive and Ocwen, the only specific allegation is that Ocwen violated the no-kickback rule. Elsewhere, the complaint generically alleges that the Stevenses discovered multiple violations of RESPA and other statutes, listing various examples. But even if we were to read the complaint liberally and presume that it alleges RESPA violations against Western Progressive, any violation would apparently have occurred in or around 2006, when the Stevenses purchased the Property. Because the complaint was not filed until 10 years later, this cause of action, whether alleging violations of the no-kickback rule or otherwise, is time-barred.

D. *The Fourth Cause of Action*

The fourth cause of action, denominated in the complaint as "Set Aside and Vacate Trustee's Sale [¶] Cancellation of Deed of Trust [¶] California Civil Code § 3412" may be in substance a cause of action either to set aside the trustee's sale or for cancellation. There is no reasonable possibility that either can be stated against Western Progressive.

1. *Set Aside Trustee's Sale*

"After a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 103.) "[T]he elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the

trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Id.* at p. 104.)

The only trustee's sale apparent from our record is the February 2016 trustee's sale to the HOA, who is not a party to this action. Because Western Progressive was not involved in this sale or in any other part of the HOA's foreclosure process, there is no reasonable possibility of the Stevenses stating this cause of action against Western Progressive.

2. *Cancellation*

"To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position." (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778; see Civ. Code, § 3412.)

It is not clear what written instrument the Stevenses seek to cancel; the prayer for relief, for example, does not seek cancellation of any written instrument in particular. The Stevenses allege that they will suffer irreparable injury "[i]f the Notice of Trustee Sale is not canceled," and the allegations under this cause of action refer to a "Trustee's Deed Upon Sale." Regardless of what written instrument this cause of action may seek to cancel, however, it fails as to Western Progressive. If the Stevenses' reference to "Notice of Trustee Sale" under this cause of action is to the one Western Progressive recorded in August 2016, there is no "reasonable apprehension of serious injury" to the Stevenses

given that the Property had, at the time of recording, already been sold to the HOA. (*U.S. Bank National Assn. v. Naifeh*, *supra*, 1 Cal.App.5th at p. 778.) If the Stevenses are referring to the HOA's Notice of Trustee's Sale and Trustee's Deed Upon Sale, then this cause of action would more appropriately be directed against the HOA, not Western Progressive. Finally, if the Stevenses seek to cancel the note they executed in 2006, the cause of action would be time-barred given that the statute of limitations on such actions is four years. (Code Civ. Proc., § 343; *Moss v. Moss* (1942) 20 Cal.2d 640, 645.) Accordingly, no cause of action for cancellation can be stated here against Western Progressive.

E. *The Stevenses' Remaining Arguments*

The Stevenses request that we grant a stay under Code of Civil Procedure section 918.5, a writ of supersedeas under Code of Civil Procedure section 923, or a trial continuance under California Rules of Court, rule 3.1332. None of these are warranted.

Code of Civil Procedure section 918.5, subdivision (a), provides that "[t]he trial court may, in its discretion, stay the enforcement of a judgment or order if the judgment debtor has another action pending on a disputed claim against the judgment creditor." It does not apply because, at a minimum, the Stevenses did not request such a stay below and do not establish that there is another action pending on a disputed claim against Western Progressive. (*Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 842 ["Ordinarily a party is prohibited from asserting on appeal claims to relief not asserted or requested in the court below."].)

"A writ of supersedeas is an appellate court order suspending the enforcement of a trial court judgment or order while an appeal is pending." (*Quiles v. Parent* (2017) 10 Cal.App.5th 130, 136.) Among other requirements, for the writ to be granted, the Stevenses must have requested the relief below (*Veyna v. Orange County Nursery, Inc.* (2009) 170 Cal.App.4th 146, 157), which they did not do. Moreover, with this opinion, the appeal is no longer pending, and therefore there is no need to suspend the enforcement of the trial court's judgment.

Finally, because Western Progressive was dismissed, it has no scheduled trial date, and accordingly, there is no date to continue under California Rules of Court, rule 3.1332.

III. DISPOSITION

The judgment is affirmed. Western Progressive is awarded its costs on appeal.

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RAPHAEL
J.

We concur:

SLOUGH
Acting P. J.

FIELDS
J.